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IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,

Petitioner,

—VS.—

JOHN E. MALESKO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Legal Aid Society of the City of New York is a private organization that has provided free legal assistance to indigent persons for nearly 125 years. The Society routinely represents clients in federal detention facilities and prisons, including private contract facilities. Many of our clients are immigrants detained by the Immigration and Naturalization Service. The Federal Defender Division of the Society represents indigent defendants charged with federal crimes at trial and on appeal, and in some post-conviction proceedings. In addition, through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of their constitutional and statutory rights. The Society routinely advocates on behalf of prisoners who suffer abuse, denial of medical care, and other mistreatment while in prison, and where necessary conducts class action litigation about prison conditions and mistreatment and brutality. The Society thus has a direct interest in safeguarding its clients' access to complete, meaningful remedies for violations of their constitutional rights during incarceration.

STATEMENT

While incarcerated for federal securities fraud, respondent John E. Malesko developed congestive heart failure and was prescribed daily medication. Joint Appendix (J.A.) at 10. On February 4, 1994, he was transferred to the Le Marquis Community Corrections Center in New York City, operated by

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[1]No counsel for any party authored any part of this brief. No persons or entities other than the *amicus curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

petitioner Correctional Services Corporation ("CSC") , where he was housed on the fifth floor. *Id.* at 10-11. Due to his heart condition, he usually was permitted to use the elevator to reach his room, notwithstanding CSC policy requiring fifth floor residents to use the stairs. *Id.* at 11.

On March 18, 1994, Mr. Malesko notified CSC that his heart medication had run out, but CSC failed to refill the prescription. *Id.* at 12. Ten days later, a CSC guard refused to permit Mr. Malesko to use the elevator to return to the fifth floor for a head count and ordered him to use the stairs. *Id.*; Appendix to Petition for Certiorari (Pet. App.) 20a. Mr. Malesko suffered a heart attack on the stairs. J.A. at 12.

CSC, a for-profit corporation then named Esmor Correctional Services (Petitioner's Brief at ii), operated the facility under a contract with the Federal Bureau of Prisons.[2] Esmor/CSC opened the facility in 1991, and from the start exhibited serious management problems. John Sullivan, *Company Running Immigration Jails Had History of Troubles*, N.Y. Times, Jun. 20, 1995, at A1. Employee turnover in the first year was nearly 100%. John Sullivan & Matthew Purdy, *In Corrections Business, Shrewdness Pays*, N.Y. Times, Jul. 23, 1995 at A1. In April 1992, federal inspectors found that the facility had 30% fewer employees than the contract required, and that the building suffered from rodent infestation, exposed wiring and other safety problems. *Id.* BOP officials later found that sufficient food was not available to the inmates, and a former official of the company stated that the company cut

[2]Esmor changed its name in 1996 after a highly publicized disturbance at a facility it operated in New Jersey, which subsequently led to the revelation of a pattern of gross mismanagement and abuse of prisoners in it charge. *See* CSC Amendment 2, SEC Form S-1 Registration Statement at 4 (Sept. 9, 1996) (available at www.freeedgar.com, ticker symbol CSCQ); *see infra* at 11-12.

costs by failing to provide enough meals for inmates. *Id.* Also, several required programs such as vocational and drug treatment were not provided as the contract required. *Id.* In December 1993, it was discovered that the low-cost drug laboratory that Esmor/CSC had chosen for drug screening had performed the tests incorrectly and returned inaccurate results. *Id.* CSC ceased operations at Le Marquis in 2000. CSC Annual Report, SEC Form 10K at 10 (April 2, 2001) (available at www.freeedgar.com, ticker symbol CSCQ).

Mr. Malesko filed this action *pro se* on March 27, 1997 in the United States District Court for the Southern District of New York against CSC and John Doe defendants alleging violations of the Eighth Amendment, and seeking damages pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 20a. On February 2, 1999, he filed an amended complaint naming Jorge Urena, the guard who denied him use of the elevator. *Id.* The district court dismissed the claims against Urena as time-barred. *Id.* at 24a. The court dismissed the claims against CSC on the ground that a corporation could not be held liable under *Bivens*. *Id.* at 20a-21a. The United States Court of Appeals for the Second Circuit reversed, holding that CSC could be subject to liability under *Bivens*. *Id.* at 5a-12a.

SUMMARY OF ARGUMENT

There are few exercises of government authority more potent than incarceration. In the prison, government power is at its zenith, as the prisoner is entirely dependent upon his jailers to provide for his well-being and ensure his survival. Increasingly, federal and local governments are turning to private, for-profit corporations to carry out these functions and undertake the difficult task of overseeing the day-to-day operations of jails and prisons.

Experience shows that private prison corporations have persistently failed to carry out their duties in compliance with the Constitution and governing laws. Corporate policies rooted in cost reduction and profit maximization rather than sound correctional practices have led to egregious conduct towards prisoners, including beatings, assault, sexual harassment and denial of necessary services like medical care. These patterns of abuse often result from economic decisions made by corporate entities rather than individual line staff. Effective deterrence of these violations must recognize corporate responsibility for the policies and practices that violate the Constitution, and ensure that the entity that commits and benefits from constitutional violations can be held accountable.

The pattern of constitutional violations that has become the hallmark of prison privatization flows directly from the nature of the private prison market. Private prison corporations are subject to a range of incentives to violate the laws that have no counterpart in government-run prisons, and as corporate entities, they typically operate free from many of the legal constraints that curb abuse and corruption in public prisons. At the same time, they are subject to market-based competitive pressures to perform satisfactorily on their contracts. The corporate entity determines how to respond to these competing pressures by deciding whether to allocate resources to shareholders or to prison operations, and making operational decisions that have a critical impact on the prison's ability to carry out its mandate in compliance with the law. The track record of private prisons demonstrates that the market pressures on corporations to comply with the law have failed to deter unconstitutional conduct, due to the structural failure of that market to hold corporations accountable for unconstitutional conduct. Absent additional incentives to comply with the Constitution in carrying out their profit-seeking mission, private prison corporations can be expected to continue their

pattern of exercising their tremendous authority with little regard for the constitutional rights of prisoners.

ARGUMENT

I. Private Prison Corporations Commit Serious Constitutional Violations For Which *Bivens* Provides An Important Remedy.

In *Bivens*, the Court recognized that the exercise of governmental power carries with it a unique power to harm, and that the Constitution serves to limit the exercise of that power. 403 U.S. at 391-92. If those who wield federal authority are free to ignore these constraints with impunity, the constitutional limitations on government have no force. To that end, *Bivens* ensured that persons harmed by someone who, while acting pursuant to federal authority, violates the Constitution, have an effective remedy at law. *Id.* at 397.

In hiring private corporations to undertake the task of incarceration, the government has vested corporations with the type of authority that ordinarily rests with individual government agents. Exercising that authority, private corporations have been responsible for serious violations of prisoners' constitutional rights, often for reasons inextricably linked to their status as operators in a for-profit marketplace rather than as public servants. Such abuses are not deterred by rules placing liability solely upon the individual actors or line staff who implement the corporate policies. To deny prisoners who are harmed by violations of their rights a remedy against the entity that perpetuates and benefits from them — the corporate jailer — is to leave corporate power essentially unchecked in the extremely sensitive realm of treatment of incarcerated citizens. *Bivens* does not permit this result. And for the reasons we set forth below, the absence of such

constitutional restraints on private prison firms will lead to further constitutional violations.

A. Prison Privatization Has Historically Been Accompanied by Severe Mistreatment of Prisoners.

As this Court observed in *Richardson v. McKnight*, correctional functions in the United States "have never been exclusively public." 521 U.S. 399, 405 (1994). "Private individuals operated local jails in the 18th century. . . . and private contractors were heavily involved in prison management during the 19th century." *Id.* (citations omitted). Most notably, under the system of convict-leasing, practiced throughout the country but most entrenched in the postbellum South, prisoners were entrusted to the hands of profit-seeking private persons or entities. *See* Alexis M. Durham III, *Origins of Interest in the Privatization of Punishment: The 19th and 20th Century American Experience*, 27 Criminology 107, 119-120 (1989); David Shichor, *Punishment for Profit* 34-38 (1995) That system was notoriously brutal, with annual death rates under some lessees approaching fifty percent, and death rates over ten percent considered normal. Matthew Mancini, *One Dies, Get Another* 33-34, 66-67 (1996); Shichor, *supra*, at 36; *see also* W.J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 Vand. L. Rev. 829, 830-39 (1987).[3]

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[3]*See also Weigel v. Brown*, 194 F. 652 (C.A.8 1912) (private prison contractor liable for unjustified whipping of prisoner); *Dade Coal Co. v. Haslett*, 83 Ga. 549, 550-551, 10 S.E. 435, 435-436 (1889) (convict recovers from contractor for injuries sustained while on lease to private company); *Boswell v. Barnhart*, 96 Ga. 521, 522-523, 23 S.E. 414, 415 (1895) (private operator of chain gang liable for death of misdemeanant due to "cruel treatment, exposure, neglect, excessive and unreasonable tasks"); *Tillar v. Reynolds*, 96 Ark. 358, 360-361, 365-366, 131 S.W. 969, 970, 971-972 (1910) (prisoner died of internal injuries after private jailer stripped him, placed him face down on log, and beat and whipped him).

In 1871, Texas authorities implemented one of the first modern-style privatization efforts after finding that Huntsville prison was not generating enough profits using convict labor. To cut costs, the state turned the entire penitentiary over to private interests. While this brought some fiscal savings for the state, "it also meant lessened security, increased brutality, and a deterioration of the physical facilities." Steve J. Martin & Sheldon Ekland-Olson, *Texas Prisons* 5-6 (1987). A state commission investigating the facility in 1875 found deplorable conditions. Three prisoners shared each five-by-seven foot cell, in filthy, vermin-infested conditions. Prisoners as young as nine years old were housed with adults. Prisoners were ill-fed and emaciated, and medical care was abysmal: the commission reported it was "at a loss for terms sufficiently strong to condemn as inhuman and unfit for the purpose, the place in the Penitentiary miscalled a hospital." *Id.* Whipping and torture were routine, notwithstanding state prohibitions on such punishment. *Id.* at 7. In 1876, there were 382 escapes and 62 prisoner deaths out of 1,700 prisoners. *Id.*

As a result of this record, in 1883 Texas ended the experiment with privatization and resumed direct control of the penitentiary, while still leasing prisoners to labor on prison-purchased farms. *Id.* Inmate deaths and escapes declined significantly. *Id.* at 8. In 1909, following another critical report, the state took full control of correctional functions. *Id.* Other states followed suit in abolishing privatization schemes like convict leasing, and for most of the 20th century, government assumed full responsibility for prison operation. *See* U.S. Bureau of Justice Assistance, *Emerging Issues on Private Prisons* 11 (2001) ("BJA"); Douglas McDonald, "Public Imprisonment by Private Means," *in* Roy D. King & Mike McGuire (eds.), *Prisons in Context* 29 (1994).

B. Contemporary Experience Demonstrates that Grave Constitutional Violations Continue in Private Prisons.

Private operation of secure prison facilities did not emerge again until the 1980s, although some community and less secure facilities had been privatized a decade or so earlier.[4] McDonald, *supra,* at 30. Since the 1980s, privatization has expanded rapidly. In the first six months of 2000, the number of prisoners in private facilities in the United States grew 9.1%, reaching 76,010 prisoners on June 30, 2000. U.S. Department of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2000*, March 2001, NCJ 185989, at 1, 4.

It is much debated whether privatization has achieved its goal of lowering incarceration costs; recent research has shown that, at best, results are mixed or show no advantage to privatization. *See* BJA, *supra,* at 22-27 (reviewing cost studies); U.S. General Accounting Office, *Private and Public Prisons: Studies Comparing Operational Costs and/or Quality of Service* 3, 7 (1996).[5] It is abundantly clear, however, that

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[4]The Immigration and Naturalization Service was one of the first agencies to privatize detention facilities, giving many of the industry's now-dominant firms an early lead in the private prison market. McDonald, *supra,* at 30; BJA, *supra,* at 12. Industry leader Corrections Corporation of America (CCA) incorporated in 1983, and now incarcerates 6% of the U.S. prison and jail population. "About CCA," www.http://www.correctionscorp.com/cca/info.html. Wackenhut Inc. entered the prison market by opening an INS detention facility in Denver, and is now the second largest firm in the field. Together these two firms accounted for 76% of the private prison market in the United States in 1996. Charles W. Thomas, *Private Adult Correctional Facility Census* 33 (10th ed. 1997).

[5]The GAO concluded that cost studies "do not offer substantial evidence that savings have occurred" in private prisons. GAO, *supra*, at 3. The report reviewed the five most comprehensive studies since 1991, and found that there was "little difference and/or mixed results" in operation costs at public and private facilities. *Id.* at 7-8.

private prison firms have committed many serious constitutional violations in their short existence, raising questions as to whether they can be relied upon to safeguard individual prisoners' rights.

Private prison firms have amassed an abysmal track record for violence. In a recent comprehensive survey of private and public facilities, the Bureau of Justice Assistance found that private prisons experience more major disturbances (e.g., riots, fires) and more inmate-inmate assaults than public prisons. BJA, *supra,* at 46, 48. Several prisoners and guards have died in private prisons as a result of the prison's failure to control these dangerous situations.[6] In comparable medium and low-security facilities, assaults on staff are more frequent in private facilities than in public. *Id.* at 52. In private facilities operated by all of the major private prison firms, including respondent CSC, staff have repeatedly been found to engage in brutality and neglect[7] and sexual assaults against

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[6]*See* John L. Clark, *Inspection and Review of the Northeast Ohio Correctional Center*, Nov. 25, 1998, ("Youngstown Report"), at 6, 15, (two homicides, 17 stabbings, assaults against inmates and staff at CCA facility); *id.* at 18 (homicide at CCA New Mexico facility in 1998, when known enemies brought out of cell in violation of separation order); Jean Christenson, *Isle Inmates' Rights Violated in Texas, Report Said,* Honolulu Advertiser, Jul. 30, 1998 (one prisoner died and 6 injured in serious disturbance attributed to inexperienced staff at private facility in Texas holding Montana and Hawaii prisoners); *see also* Rebecca Roybal, *Violence Not New at New Mexico Private Prisons,* Albuquerque Journal, Nov. 12, 2000 (pattern of violent uprisings at New Mexico private prison).

[7]*See, e.g., LeMoine v. New Horizons Ranch & Center*, 990 F. Supp. 498 (N.D. Tex. 1998) (12 year old died from heat exhaustion at private facility after being forced to haul rocks in 103 degree heat, while taking facility-provided medication that interfered with heat regulation);

prisoners.[8] Numerous escapes from private prisons have highlighted their often shoddy security, raising concerns about the safety in the communities in which they operate.[9]

Karen Brooks, *CSC Might Lose One*, Star-Telegram, Jan. 18, 2001 (18 year old died from untreated pneumonia at CSC boot camp in Texas in 2001); Youngstown Report, *supra*, at 6, 15 (excessive use of force and harsh treatment of prisoners by CCA senior managers); *Kesler v. King*, 29 F. Supp.2d 356, 360, 361 (S.D.Tex. 1998) (beatings and savage treatment of private prisoners); Jeff Jones, *Guards Hurt in Prison Riot*, Albuquerque Journal, Apr. 7, 1999, at A1 (private prison officials admit to covering up incidents of excessive force); Tim Hoover, *Ex-Guard Accused in Jail Beatings is Arrested*, Tulsa World, Apr. 7, 2000 (CCA guard in Oklahoma arrested for assault on 5 prisoners).

[8]*See, e.g., Giron v. Corrections Corp. Of America*, 14 F. Supp.2d 1245, 1246-47 (D.N.M. 1998), *aff'd in part, rev'd in part*, 191 F.3d 1281 (10th Cir. 1999) (rape of prisoner by CCA guard); Bob Schober, *Twelve Probationers Pulled From Camp*, Dallas Morning News, May 19, 2001, at 38A (prisoners at CSC boot camp awarded judgments for sexual harassment by CSC staff, other prisoners removed due to sexual abuse); Debra Barayuga, *Isle Inmates Sue for Alleged Rapes*, Honolulu Star-Bulletin, Nov. 2, 2000 (Hawaiian prisoners in CSC-operated Oklahoma facility raped by staff); James McNair, *Prison Operator Reacting to Problems and Criticism*, Miami Herald, May 15, 2000, at 10A (12 Wackenhut guards in East Austin, Texas indicted for having sex with female prisoners); Carla Crowder, *Sex Scandal Rattles Private Prison*, Denver Rocky Mountain News, Sep. 26, 1999 (15 female guards in CCA facility had sex with prisoners).

[9]*See* Youngstown Report, *supra*, at 5, 15-16 (detailing pattern of escapes from CCA facilities, including four high security prisoners from Tennessee facility in October 1998; six prisoners from Youngstown in July 1998; three murderers and two sex offenders from Arizona facility in October 1996; five prisoners from another Arizona facility in 1996; one prisoner from Arizona in 1996, by walking through front door with group of visitors); BJA, *supra*, at 47 (documenting 45 escapes from 14 private facilities in 1997); Daniel LeDuc, *Staff Faulted For Lapses at Md. Centers*, Wash. Post, Jul. 14, 1999, at A6 (CSC officials admit responsibility for escapes from Maryland facility due to failures of prison staff to follow

These patterns of abuse and mistreatment often stem directly from corporate failures to manage the prisons in a safe, secure manner. The inability or unwillingness of the small handful of corporate actors dominating the field to implement policies and direct resources to ensure that facilities are operated in accordance with constitutional standards has been amply demonstrated. Examples from some of the more well-documented incidents illustrates this problem.

1. In 1994, Esmor/CSC opened a facility in Elizabeth, New Jersey under contract with the INS to detain noncriminal aliens. Serious mismanagement and mistreatment of detainees was evident from the start, principally due to Esmor/CSC's failure to train its staff in correctional procedures, and its failure to provide sufficient guards to cover all security posts. INS, *The Elizabeth, New Jersey Contract Detention Facility Operated By Esmor, Inc., Interim Report*, July 20, 1995, at 5-7, 56 ("INS Interim Report"); Matthew Purdy & Celia W. Dugger, *Legacy of Immigrants' Uprising: New Jail Operator, Little Change*, N.Y. Times, July 7, 1996, at A1 (detailing early evidence of mismanagement of the facility). According to an INS investigation, Esmor/CSC guards physically abused detainees, shackled them without reason, stole their property, imposed arbitrary punishment on detainees not guilty of any infraction, and generally harassed detainees. Counsel for the immigrants reported serious problems obtaining access to clients, and repeatedly complained that immigrants were shackled during interviews. INS Interim Report, *supra*, at 5-7, 56; *see also Jama v. INS*, 22 F. Supp.2d 353, 358-59 (D.N.J. 1998) (deplorable conditions at facility); Ashley Dunn, *Harsh*

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procedures); Ashley Dunn, *Close Detention Center, Local Authorities Urge*, N.Y. Times, Jun. 20, 1005, at B4 (law enforcement find community safety compromised by mismanagement of CSC/Esmor facility).

Criticism of Detention Center, N.Y. Times, Jun. 19, 1995, at B4.

The poor conditions fueled a major riot on June 18, 1995. The staff, untrained to handle the emergency, ignored established security procedures to defuse disturbances, and fled the facility. As a result, a small group of detainees took over and destroyed much of the facility until local law enforcement regained control the following day. INS Interim Report, *supra*, at 56-61; Richard Perez-Pena, *Illegal Aliens Overrun a Jail in New Jersey*, N.Y. Times, Jun. 19, 1995, at A1. The facility remained closed for 18 months. CSC/Esmor sold its rights to the facility to the private Corrections Corporation of America (CCA) for $6.2 million, thus, according to CSC/Esmor's president, avoiding any "significant" financial loss due to the disturbances. Purdy & Dugger, *supra*, at B4.[10]

2. In May 1997, CCA opened a facility in Youngstown, Ohio to house over 1,700 District of Columbia prisoners. Within its first 14 months, the facility "experienced pivotal failures in security and operational management as a result of seriously flawed decisions by leaders of both CCA and DOC," according to a review commissioned by the U.S. Department of Justice after several highly publicized violent incidents at the facility. Youngstown Report, *supra*, at 5, 10. The review found "a pattern of flawed security attributable to both corporate and institutional management deficiencies" and concluded that "CCA repeatedly practiced inadequate correctional management." *Id.* at 55. In order to boost the occupancy rate

[10]Losing the contract on the Elizabeth facility apparently did not impede Esmor/CSC's growth, as it earned record revenues less than a year later. *Correctional Services Corporation Reports Second Quarter Operating Results*, Business Wire, Aug. 13, 1996. From 1992 to 1996, CSC's revenues nearly tripled. *Id.*

as quickly as possible, CCA did not screen prisoners to determine if they should be housed together in a medium-level facility, but rather "uncritically accepted" all prisoners, including numerous prisoners who should never have been housed together. *Id.* at 53. CCA managers employed brutal policies "well beyond common or necessary correctional practices," engaged in excessive use of force against prisoners, failed to maintain control over weapons, and failed to implement numerous security procedures. *Id.* at 5. As a result, there were two homicides, numerous stabbings, extreme levels of violence, and six escapes within the first 14 months. *Id.* Notwithstanding these severe security breaches, CCA failed to conduct any internal audit until required to do so by the federal government. *Id.* at 18. The review concluded, "Fundamental security was repeatedly compromised by the larger corporate structure's apparent inability to assure the implementation of adequate security in a newly opened facility and learn from major security breakdowns. . . . escapes might have been prevented had CCA implemented company-wide reviews or changes. . . . or if it had in place effective internal controls an security audit processes." *Id.* at 17.

3. In New Mexico, a pattern of violence in the state's Wackenhut-operated prisons came to a head in August 1999, with a major riot after two prisoners were stabbed and a guard murdered at the Guadalupe Facility. *The Consultants' Report on Prison Operations in New Mexico Correctional Institutions*, January 14, 2000 ("New Mexico Report") at E3. A state-appointed Special Advisory Group investigated the problems, and found serious flaws in the structure and management of the private prisons. The report found that "staffing issues and a lack of experience in both line and supervisory staff were particularly serious deficiencies" (*id.* at E14); that the facility contained serious design flaws that provided opportunities for violence (*id.* at E5); and that Wackenhut lacked proper methods

or systems for numerous basic correctional tasks, such as providing sufficient guard coverage of posts, assessing potential violence, classifying prisoners, managing gang intelligence, investigating misconduct, conducting security inspections, and numerous other problems. *Id.* at E4-5, E13-14. Investigators concluded that "the Wackenhut facility and staffing complement were not capable of managing inmates" housed there, and that "insufficient communication and mutual problem solving impeded a working relationship between New Mexico and Wackenhut from the beginning of the contract period." *Id.* at E-5.

4. The egregious abuse of juveniles in privately-operated facilities in Louisiana received widespread attention in the last several years, eventually forcing the state to resume control of all its juvenile facilities. In 1997, a U.S. Department of Justice investigation detailed widespread physical abuse of youth and poor conditions at the privately-operated Tallulah facility. U.S. Department of Justice, *Findings of Investigation of Secure Correctional Facilities for Juveniles in Louisiana*, Jun. 18. 1997 (available at http://www.usdoj.gov/crt/split/documents/lajuvfind1.htm). For example, DOJ found incidents of "guards beating up juveniles, including one child whose hands were cuffed behind his back who was bleeding heavily from the mouth, and guards macing youth while they were being held by other guards" and a guard beating a youth with both fists and hitting him in the head with a radio. *Id.*

At the Wackenhut-operated juvenile facility in Jena, Louisiana, a state court ordered several juveniles released due to the severe mistreatment they suffered at the facility. Fox Butterfield, *Private Company to Pull Out of Operating Troubled Prison*, N.Y. Times, April 27, 2000, at A2. Guards beat one youth so severely that his intestines protruded several inches into the colostomy bag he wore due to a prior gunshot

injury. NPR, March 16, 2000, Interview with Judge Doherty, Orleans Parrish, Louisiana; *see also* "I Know Why the Cajun Bird Sings," *Harpers*, July 2000, at 29-30. In a two-month period, 25% of the juveniles were "traumatically injured," often by guards who had not been taught non-injurious techniques of controlling inmates. *Harpers, supra*, at 29. Youths were kept in solitary confinement for months, deprived of medical care, and denied shoes and blankets during the winter. Fox Butterfield, *Privately Run Juvenile Prison in Louisiana is Attacked for Abuse of 6 Inmates*, N.Y. Times, March 16, 2000, at A14. Following extensive press coverage of the abuses, the state took over operation of the Jena facility in April 2000. Butterfield, *Private Company to Pull Out of Operating Troubled Prison, supra*.[11]

5. In 1996, Capital Correctional Resources, Inc. (CCRI) leased part of the Brazoria County, Texas Detention Center to house inmates from Missouri. *Kesler v. King*, 29 F. Supp.2d 356, 360, 361 (S.D.Tex. 1998). CCRI staffed the facility with inexperienced and poorly qualified guards, including two guards with criminal convictions for beating inmates. *Id.* Although the contract required local authorities to oversee hiring and training, the *only* training guards received was in opening and closing cellblock doors. *Id.* at 362.

Shortly after the facility opened, guards conducted a violently abusive raid that was captured on videotape. *Id.* at 362. Prisoners in their housing areas were forced to strip naked, endure body and cavity searches, and crawl on their stomachs, while they were kicked and stomped on by one of the

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[11]The United States and private plaintiffs settled lawsuits arising from these and other abuses at the Louisiana juvenile facilities, and control of the facilities returned to the state. *Williams v. McKeithen*, 121 F. Supp.2d 943 (M.D.La. 2001) (approving settlement agreement).

guards with a prior conviction for beating prisoners. *Id.* at 363. The officers repeated these tactics in other housing areas, deploying tear gas and unleashing dogs who mauled several prisoners. *Id.*; *In re Tex. Prison Litig.* 191 F.R.D. 164, 166-67 (W.D.Mo. 1999). For months, CCRI officials and local authorities engaged in a pattern of cover-ups and lies about the incident. *Kesler*, 29 F. Supp.2d at 363-364. For example, CCRI refused to provide information or turn over the videotape to the Missouri correctional authorities. *Id.* CCRI also ignored or destroyed numerous prisoner grievances alleging excessive force by the CCRI guards. *Id.* at 365. The cover-up was successful until numerous television stations received the videotape and broadcast the tape months later. *Id.*

II. Adequate Remedies Against Private Prison Firms are Critical Given the Structural Features of the Private Prison Market that Encourage Constitutional Violations.

Although public prisons are the site of constitutional violations every bit as repugnant as the examples from private prisons, unique features of privatization give rise to a propensity for constitutional violations in private prisons. The private corporation's diminished accountability to the public, and its economic incentive to increase profits by cutting costs to the extent permitted by the market, encourage private prisons to ignore the constraints of the Constitution. These incentives operate most directly upon the corporation rather than its individual employees, driving corporate policy decisions — such as adequate recruitment and salaries, training in professional corrections techniques, sufficient staffing of facilities, and the availability of programs to prisoners — that significantly affect the conditions of confinement and treatment

of prisoners.[12] Experience has shown that neither liability of individual line staff nor the competitive pressures of the private prison market are sufficient to counteract these incentives on firms to engage in unconstitutional conduct. Effective deterrence of constitutional violations must recognize corporate responsibility for violations and provide the corporations with an incentive to operate within the bounds of the Constitution.

1. Private Prisons' Diminished Accountability Fosters Abuse.

The coercive authority granted to prisons, both public and private, is rendered even more potent by the closed, isolated world in which it is exercised. As the Court has recognized, while "supervision by the community afford[s] significant safeguards against abuse" in other institutions, "there is little, if any, protection by way of community observation" in prisons. *Cleavinger v. Saxner*, 474 U.S. 193, 205 (1985). When accountability is diminished, constitutional violations are more likely to occur.

Several mechanisms operate in the public realm to offset the prison's isolation and ensure that prison officials are

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[12]While employees have an interest in the firm's success insofar is it affects their job security, corporate cost-cutting measures are often adverse to the individual employee's interests. Prison guards have a paramount interest in ensuring that their facility is orderly and secure, and that fellow staff are well-trained in controlling prisoners. Private prison guards have persistently reported that their mission has been compromised by corporate decisions resulting in short-staffing, over-reliance on overtime, and unsafe working conditions. *See, e.g.*, Rebecca Baker, *Guards Blast Prison on TV Show*, Tribune Chronicle-Warren Ohio, Jul. 31, 1998 (guards at Youngstown describe grossly inadequate training); Carla Crowder, *Sex Scandal Rattles Private Prison*, Denver Rocky Mountain News, Sep. 26, 1999 (female guards in short-staffed prison required to oversee 288 male inmates in three housing areas).

held accountable to the public to some degree. These range from traditional political and community influence over prison administration, to the array of civil service regulations governing hiring and performance in public jobs, to laws that require government to reveal information about its operations.[13] These constraints are largely absent from private prisons for several reasons.

The nature of the private prison market as it currently operates profoundly disrupts the political links among the community, prisoners, and the correctional agency that oversees the prisoners daily existence. While prisoners have long been incarcerated in prisons geographically remote from their communities of origin, host communities of public prisons had ready means to determine "who was in charge" of facilities and make clear their expectations of the treatment of prisoners therein. The modern private prison industry has dramatically altered this landscape by facilitating the practice of creating

[13]For example, the Freedom of Information Act, 5 U.S.C. § 552, and similar state laws ensure public access to government information on a scale without parallel in the private sector. By its terms, FOIA applies only to federal "agencies" (5 U.S.C. §552 (1988)), and records they create or retain. *Forsham v. Harris*, 445 U.S. 169, 180 (1980); *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 152 (1980). In addition, FOIA contains a broad exemption for confidential "trade secrets and commercial or financial information" (5 U.S.C. §552(b)(4)) that would likely preclude disclosure of important information about private prisons. Not surprisingly, private prison firms have repeatedly refused to reveal information about their operations on the grounds that it constitutes proprietary information. *See, e.g.*, Alan Clendenning, *Wackenhut's Troubles Continue*, Associated Press, May 22, 2000 (Wackenhut refuses to disclose governments from whom it sought contracts to fill Jena, Louisiana facility after state officials closed it); Karen Testa, *ACLU Sues to Get Wackenhut-Run Prison's Records*, Miami Herald, June 6, 1999, at 2B (Wackenhut-run facility refused to provide records pursuant to state public records laws, admits to refusing to provide records in other facilities).

prisons "on spec" — that is, locating prisons in communities seeking economic development, building them without a contract for prisoners, then filling them with prisoners from multiple outside jurisdictions, with no connection to local correctional agencies.[14] Multinational corporations, rather than local correctional agencies, become the jailers and decisionmakers on crucial issues such as staffing and security; the prisoners are no longer errant members of the community, but are strangers to it. While communities that host private prisons may, in theory, try to influence whatever distant governmental entity contracts with the private prison, such mechanisms are vastly more uncertain and attenuated than traditional local community oversight. *See, e.g.*, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 631 (2000).

Private prisons thus typically operate outside of the existing structures that monitor government prisons to ensure accountability. They are not, for example, subject to internal affairs or other monitoring capabilities of departments of correction or other state or local oversight bodies.[15] Although the contracting government (for example, a state Department of Correction) is typically permitted to monitor performance of the private prison, other oversight agencies, including those

[14]*See, e.g., Evans v. Holm*, 114 F. Supp.2d 706, 708 (W.D. Tenn. 2000) (CCA facility in Tennessee houses federal detainees and state inmates from Wisconsin and other states); *Luong v. Hatt*, 979 F. Supp. 481, 483 (N.D. Tex. 1997).

[15]For example, in New York City, there is a Board of Correction that inspects city jails and promulgates minimum standards for many aspects of jail operations, including medical care. New York City Charter § 626. There is also a New York State Commission of Correction, with regulatory authority over state prisons and local jails. N.Y. Const., art. XVII, § 5; N.Y. Correction Law §§40, 45. Private facilities that do not hold New York prisoners would not be subject to these laws.

that would typically oversee the contracting agency as well (e.g., an inspector general) lack jurisdiction to monitor the private facilities. *See Richardson*, 521 U.S. at 409-10 (noting lack of statutory oversight of Tennessee private prisons as compared to public prisons). For example, CCA's Youngstown facility was not subject to any oversight by the host state, since no Ohio corrections law or regulation governed private facilities, and the Ohio Department of Corrections was in no position to monitor the performance of the contracting government, the District of Columbia's Department of Corrections. James E. Roberts, *City of Youngstown Learns Oversight Lesson the Hard Way*, Correctional Law Reporter, December/January 2000, at 55-56; Pam Belluck, *As More Prisons Go Private, States Seek Tighter Controls*, N.Y. Times, Apr. 15, 1999, at A1 (describing lack of oversight of private prisons); *cf.* Ohio Rev. Code Ann. §9.07 (Baldwin 2001) (enacted March 17, 1998 in response to Youngstown problems to set standards for private facilities). When Ohio authorities sought access to the facility to investigate the disturbances, CCA denied them admission. Youngstown Report, *supra*, at 22; Mark Tatge, *Inspectors Question Youngstown Prison Access*, Plain Dealer, May 9, 1998, at B4. There was no significant oversight of the facility until, at the Ohio governor's request, the U.S. Department of Justice ordered an independent review. Youngstown Report, *supra*, at 23.[16]

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[16]In other instances, private prisons and contracting governments have resorted to byzantine arrangements to circumvent the accountability functions of public procurement procedures. In New Mexico, when state officials declined to accept Wackenhut's proposal to operate state facilities, Wackenhut contracted directly with individual counties, which are not subject to the state procurement code, to run their local jails. New Mexico Report, *supra*, at E-18. The counties then separately negotiated with the state to fill those jails with state inmates. *Id.* Thus, although the jails functionally served as state prisons, and never housed county inmates, they were not subject to established state controls and accountability.

On a larger scale, employees of public agencies and private corporations are subject to fundamentally different legal regimes that dictate their loyalties and accountability to the public. For example, federal public employees are subject to a myriad of laws designed to protect the integrity of the government: officials are bound by strict nepotism rules in hiring (5 U.S.C. §§2302(b)(6)- (7); 5 U.S.C. §3110); they are criminally liable for willfully interfering with the hiring process (18 U.S.C. §1917); and they can be subject to criminal sanctions for falsifying an employment application. 18 U.S.C. §1001. Extensive ethics laws prohibit conduct that conflicts or appears to conflict with the government's public interest, or provides for personal gain incompatible with government service. 5 C.F.R. §2635.101(a); *see also* 18 U.S.C. §§201- 209. Private actors are not constrained by these laws — indeed, to privatization advocates, freedom from such civil service requirements may be considered a *benefit* of privatization. Instead, corporate officials are constrained in the first instance by their fiduciary duty to act in the interest of the corporation and its shareholders. *See, e.g., United States v. Bynum*, 408 U.S. 125, 137-138 (1972). To the extent that the corporate interest is not co-extensive with the public interest, the corporate actor has a duty to act without regard to the public interest.

Moreover, publicly employed guards and personnel are protected in a variety of ways from retaliation for exposing abuses. Prison guards employed by the Federal Bureau of Prisons, for instance, cannot be terminated from employment without cause. *See* 5 U.S.C. §7513. The Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16 (1989), also affords them a significant degree of protection from retaliatory actions should they disclose unlawful conditions or official

misconduct.[17] But corporations remain largely free to terminate employees who expose corporate wrongdoing, since the overwhelming number of non-public employees are employed at will. Facing termination for exposing unlawful treatment of prisoners poses a clear disincentive for employees to bring abuses to light, and provides corporations with a freedom from scrutiny not found in the public sector.

2. Private Prison Firms Face Unique Economic Incentives That Often Clash With Safeguarding Prisoners' Rights.

As profit-seeking enterprises, private prisons are subject to incentives to cut costs that are generally absent in the public sector. Indeed, these incentives are touted as the primary benefit of privatization, permitting private prisons to provide services more cheaply than the government can. Experience has shown, however, that private firms have often pursued profits to the detriment of prisoners' welfare.

One of the most widespread — and dangerous — cost-cutting methods deployed by private prison firms is to reduce labor costs by hiring fewer and less qualified staff, paying lower salaries, and reducing or eliminating critical staff training and oversight. Since labor costs account for roughly 75% percent of the overall costs of corrections, labor reductions can

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[17]Many former private prison officials maintain that they were fired or otherwise suffered retaliation for reporting mistreatment of inmates. *See, e.g.*, Carla Crowder, *Ex-Warden Says He'll Sue State*, Denver Rocky Mountain News, Apr. 26, 2000 (warden of troubled CCA facility in Colorado alleges he was fired for exposing CCA's failure to comply with contract); Rachel Horton, *Former Boot Camp Worker Issues Apology*, Dallas Morning News, Oct. 20, 2000, at 1A (former CSC employee alleges company sought to preclude him from testifying about sexual abuse of female inmates).

have a dramatic impact on short-term profitability. BJA, *supra*, at 16. Not surprisingly, many of the most serious violations that have been observed in private prisons have been attributed directly to the prison's failure to train staff or provide sufficient staff coverage. *See, e.g.*,; Youngstown Report, *supra*, at 7 (citing "the lack of correctional experience on the part of almost all staff, especially supervisors" who were "not yet sufficiently experienced and trained for their duties"); New Mexico Report, *supra*, at E3, E5, (attributing violence to prison firm's inability to recruit experienced staff due to low wages); Ken Kolker, *Changes Ahead for Troubled Prison*, Grand Rapids Press, May 20, 2000 (Wackenhut-operated youth facility more violent than state adult maximum security prison due to understaffing)[18]

Private prisons have also frequently been faulted for cutting costs by reducing the services mandated by their initial contracts or governing law. These include denial of needed medical services, such happened in January 2001 at CSC's Mansfield, Texas "boot camp", where an 18 year old prisoner died of untreated pneumonia. Anthony Spangler, *Boot Camp Discourages Inmates' Illness Reports*, Fort Worth Star-Telegram, Jan. 25, 2001, at 1. Similar cost-cutting measures were behind much of the mistreatment uncovered at Louisiana's juvenile facilities; the U.S. Department of Justice concluded that many of the serious violations it reported were "linked to the reluctance of Wackenhut Corporation to spend adequate funds to provide for the care of the youth." Butterfield, *Private Company to Pull Out of Operating Troubled Prison, supra*.

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[18]In 1997, the average starting salary for private correctional officers in 1997 was $17,415. U.S. Corrections Corporation reported the lowest average starting salary at $14,824; Wackenhut had the highest average salary at $18,785. BJA, *supra*, at 45.

Similarly, at Youngstown, the contract required the facility to provide sufficient programming to ensure every general population inmate had access to occupational training, work, education, drug treatment or other programs. Youngstown Report, *supra*, at 86. Outside auditors discovered that only 33% of inmates were employed, the vast majority for just a few minutes each day cleaning their housing area or distributing food trays or laundry. *Id.* Very few inmates participated in the school program, and those who did were in class at most six to eight hours per week. *Id.* at 86-87.

In addition to cost-cutting, firms have a financial incentive (and a duty to their investors) to boost demand for their services — that is, to keep enough people in prison as long as possible. On the political front, privatization thus has given corporations a potent incentive to direct their significant wealth to influencing important public policy debates about criminal justice, sentencing, and corrections issues — such as how to reduce recidivism (which benefits corporate actors), expand alternatives to incarceration, or design rational sentencing and penal policies. On the more day-to-day level of prison operation, the corporate interest in keeping the beds filled can result in violations of prisoners' constitutional rights. In one extreme episode, a CSC official ordered a CSC-operated juvenile facility in Florida to hold 10 juvenile prisoners five days past their release date solely in order to have the youths "counted" by the state in their twice-yearly census that determined CSC's funding. Tyler Bridges, *Detention Center Apologizes for Delaying Juveniles' Release*, Miami Herald, Jan. 8, 1999, at 5B.[19]

[19] *See also Blumel v. Mylander*, 954 F. Supp. 1547, 1555-56, 1557 (M.D. Fla. 1997) (CCA violated constitutional rights of detainee held 30 days on warrantless arrest without a determination of probable cause).

Even leaving aside such extraordinary measures, the prison's interest in maintaining a prison population may affect the imposition of discipline on prisoners. Infractions of prison rules are often punished by the forfeiture of "good-time" credits, or reductions in sentences that prisoners obtain by compliant behavior. *See, e.g.*, 18 U.S.C. §3624(b)(1) (federal prisoners serving sentences over one year and less than life may receive up to 54 days of good time credit annually for compliance with institutional disciplinary regulations). By finding prisoners guilty of infractions and denying them good-time credits, private prisons increase their profits by lengthening a prisoner's incarceration period. Private prison firms thus face a conflict between their interest in maintaining high capacity, and the prisoners' interest in ensuring disciplinary rules are propounded and applied fairly. A corporate employee sitting in judgment of prisoners' disciplinary infraction, knowing that an adverse ruling will keep that prison bed occupied for longer, may not be an impartial decision-maker.

Moreover, the corporation has an incentive to promulgate disciplinary rules for all of its prisons that result in more infractions — essentially a policy-level decision to boost the populations — and to encourage staff to apply the rules unfairly. For these reasons, the Court in *Richardson* found it "significant that. . . Tennessee law reserves certain important discretionary tasks — those related to prison discipline, to parole, and to good time — for state officials." 521 U.S. at 411-12. However, in many systems, private operators retain control over the disciplinary process, and thus, over the length of sentences of certain prisoners. *See* Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 Seton Hall. Legis. J. 371, 405-07, 414-16 & nn. 223-230 (1987) (surveying federal and state limits on private corporate control of prison discipline).

3. Competitive Market Forces Do Not Sufficiently Deter Abuse.

It is a commonplace argument that, given the competitive pressures of the private prison marketplace, firms will respect constitutional constraints in order to keep contracts, on the assumption that government will terminate the contract upon a finding of constitutional violations (or at a minimum, that the contract will be rendered more costly due to payment of judgments over the conditions). *See, e.g., Richardson,* 521 U.S. at 409. Regardless of whether the profit motive necessarily corrupts private incarceration endeavors, there are several reasons to believe that the market for private incarceration cannot be relied upon as a means of ensuring adherence to the Constitution.

First, the private prison market, in its modern form, is not the equivalent of a highly competitive commodity market. It is essentially oligarchic, overwhelmingly dominated by a few multinational corporations whose market shares have increased considerably at the expense of smaller competitors. *See* Thomas, *Private Adult Correctional Facility Census, supra* , at 33 (three firms occupy over 80% of market). As a practical matter, when one firm fails to meet its contractual obligations to a government, there are often at most only one or two other firms with the capacity to assume the contract.

Second, the assumption that governments will terminate contracts upon findings of unconstitutional conduct is not borne out in reality. Governments have typically tolerated unconstitutional conduct and substandard compliance in their private facilities until a major disturbance or some other high-profile event spurs them to take action. For example, prisoners at Youngstown filed a class action lawsuit detailing their mistreatment and unconstitutional conditions at the CCA

facility in August 1997, but it was not until several widely publicized murders took place six months later that any meaningful government oversight began. *See* Youngstown Report, *supra,* at 5, 7. Similarly, it took major riots before the contracting governments in charge of Esmor/CSC's Elizabeth facility and Wackenhut's New Mexico facilities to intervene. *See supra* at 11-14. Moreover, to the extent that government actors' decisions are influenced by factors other than the cost and performance of the prison — such as repaying political debts or satisfying a corporate constituency — they may be more likely to continue the contracting relationship despite poor performance by the contractor. *See Richardson,* 521 U.S. at 418-19 (Scalia, J., dissenting).

More critically, reliance on governmental termination of contracts (or renegotiation on less favorable terms) to deter constitutional violations depends entirely upon effective, comprehensive government monitoring and data collection. Yet such vigilant monitoring has been notably absent in the private prison context. As a threshold matter, contracting governments have an interest in keeping problems at the facilities from coming to light, given that violations by the contractor will also be attributed to the government that hired it. But even apart from this political disincentive to monitor, monitoring failures stem from the economic nature of the government-private firm relationship, which is characterized by the problem of "hidden delivery," a type of market failure in which "the purchaser of a good is unable to observe its consumption." James Gentry, *The Panopticon Revisited: The Problem Of Monitoring Private Prisons,* 96 Yale L.J. 353, 356 (1986). In such a case, the buyer cannot accurately gauge the quality of the product delivered; the seller, who knows this, has an incentive to deliver less value and pocket the difference. *Id.*

While governments contracting with private prisons

assure the public that they will monitor the facilities closely, practice demonstrates that these monitoring systems often fail dramatically.[20] The absence of meaningful oversight was transparent in Brazoria County, Texas, where the on-site sheriff tasked with monitoring the private facility recommended that the facility hire guards known to have criminal convictions for abusing inmates; participated in covering up the abuses; and repeatedly stated that he had no responsibility for setting standards or making policy for the private prison. *Kesler v. King*, 29 F. Supp.2d at 362-365.

More typically, contracting governments abdicate their monitoring role, and private prisons thwart active monitoring by hiding information and refusing to cooperate with the governmental body. For example, after the riots at the CSC/Esmor facility in New Jersey prompted an investigation of the conditions at that facility, the INS concluded:

> Oversight of the Esmor operation by the Newark [INS] district was minimally effective. Communication between the INS and Esmor was insufficient.... Esmor was able to distance itself from oversight by the INS and conceal information concerning its operations. . . . Esmor demonstrated a pattern of initiating changes in policy without prior notification to the INS... materially hinder[ing] INS' ability to effectively perform its oversight functions.

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[20]Indeed, they fail predictably: typically, government officials embrace privatization to reduce costs. In selling the idea of cost-savings to the public, they seek to reduce costs as much as possible, and do not always budget adequately for the cost of monitoring the private prison in calculating the contract price. When they do, they may discover that the combined costs of the contract and monitoring exceed the costs to the government in running the prison system itself. Gentry, *supra*, at 359.

INS Interim Report, *supra*, at 3, 9. Similar problems occurred at Youngstown, where the District of Columbia conducted virtually no on-site monitoring, notwithstanding persistent reports of security problems, until ordered to do so by a federal court; and CCA repeatedly refused to cooperate with investigatory bodies. Youngstown Report, *supra*, at 7, 55.

In addition, government incurs significant costs in changing contractors. *See* Note, *Qualified Immunity--Privatized Governmental Functions*, 111 Harv. L. Rev. 390, 397 (1997) (noting significant startup costs, lack of competition, and high costs of resuming a contract with a new contractor). Governments must undertake the often lengthy process of soliciting and evaluating bids and negotiating new contracts; entire prison populations may need to be moved from one facility to another, raising significant security problems; a new staff must be trained in the new jurisdiction's procedures; and governments suffer from a significant loss of continuity in the relationship with the private company. Firms recognize these transaction costs and the tremendous advantage of securing an initial contract, and thus have an incentive to artificially lower bids on initial contracts with jurisdictions simply to get a foot in the door. *See* Gentry, *supra*, at 358 (recognizing economic value of entrenchment). Faced with these costs, a rational government could well conclude that the costs of obtaining a new contractor exceed the costs of maintaining a relationship with an old contractor, even in the face of increased costs due to liability for unconstitutional conditions.

Finally, the market-restraint argument does not account for the prospect that, at the end of the day, it may make economic sense for a prison to egregiously violate inmates' rights if the cost savings thereby generated still exceed the costs of liability. This is more likely to occur if the prison firm is not

required to internalize the costs of its wrongdoing through liability rules. Given the significant impediments to prisoners' recovery of damages for constitutional or common law torts — such as their indigent status, inability to retain qualified counsel, fear of retaliation from prison staff, as well as statutory impediments to prison litigation[21] — the aggregate damages may still be lower than the cost savings a prison could obtain by hiring incompetent staff, overcrowding, refusing to meet basic nutritional and medical needs, cutting programming, and refusing to maintain the facility. To protect the *individual*'s rights to constitutional treatment while in prison, a more effective deterrent than the market is necessary. Unless the private prison firms are held accountable for the damages from constitutional violations from which they benefit, they will have little reason to comply with the Constitution if they can benefit economically from ignoring it.

CONCLUSION

The decision of the court of appeals should be affirmed.

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[21]Under the Prison Litigation Reform Act, prisoners may no longer recover for mental or emotional injury without a showing of physical injury. 42 U.S.C. § 1997e(e). The PLRA also requires prisoners to exhaust administrative remedies (42 U.S.C. § 1997e(a)), even when they are damage claimants and the prison grievance system does not provide for damages; prisoners who fail to grasp this rule will have their cases dismissed. *Booth v. Churner*, 121 S.Ct. 1819 (2001). Attorneys' fees for prisoners who prevail on their claims have been drastically reduced. 42 U.S.C. § 1997e(d); *see Martin v. Hadix*, 119 S.Ct. 1998 (1999). Prisoners seeking to proceed *in forma pauperis*, unlike other IFP litigants, are now required to pay the filing fee in installments, which may constitute a significant deterrent to filing meritorious as well as other cases. 28 U.S.C. § 1915(a)-(c). Some prisoners are now barred from using the *in forma pauperis* provisions entirely. 28 U.S.C. § 1915(g).

Respectfully submitted,

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